



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF F-H-

DATE: MAY 21, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a [redacted], seeks to employ the Beneficiary as a charge nurse manager. The Petitioner requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary possesses an advanced degree or a baccalaureate degree and five years of progressive experience in the specialty. He also determined that the prevailing wage determination (PWD) submitted with the petition states different requirements for the offered job than those listed on the uncertified labor certification application, and that as such the PWD is not valid for the submitted petition.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary has a baccalaureate degree and five years of progressive experience. It further states that the discrepancy between the labor certification and the PWD is not a substantive one and that the requirements listed on the PWD meet the requirements for a Schedule A occupation regardless of the experience required.

Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. Employment-Based Petitions for Schedule A Occupations

A Schedule A occupation is an occupation codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of foreign nationals in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require a petitioner to test the labor market and obtain a certified labor certification from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified labor certification. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.¹ If USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

B. Beneficiary's Qualifications

The Director determined that the Beneficiary does not meet the requirements of the labor certification. A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

The labor certification requires a master's degree in nursing or a bachelor's degree and five years of experience.² The labor certification states that the Beneficiary qualifies for the offered position based on a bachelor's degree in nursing completed in 2009 at [redacted] of Nursing in India. The record contains the Beneficiary's transcripts and bachelor of science in nursing degree issued by [redacted] of Nursing in India in 2006. The issue on appeal is whether the Beneficiary has five years of post-baccalaureate experience.

The labor certification lists her experience as follows:

- Assistant nurse manager at [redacted] Hospital [redacted] Florida, from April 15, 2014, to the date the labor certification was filed on December 21, 2016;
- Registered nurse at [redacted] Hospital [redacted] India from March 19, 2007, through June 12, 2008;³ and
- Registered nurse at [redacted] India from February 2006 to August 2007.⁴

¹ The priority date of the petition is December 21, 2016, the date the completed, signed petition was properly filed with USCIS. *See* 8 C.F.R. § 204.5(d).

² The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by an official academic record showing that the beneficiary has a United States advanced degree or a foreign equivalent degree; or an official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employers showing that the beneficiary has at least five years of progressive post-baccalaureate experience in the specialty. A letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1).

³ The labor certification states that she worked 36 hours per week.

⁴ The labor certification states that she worked 40 hours per week. This position overlaps with her job at [redacted] Hospital from March 19, 2007, to August 2007. It is not clear how she worked two full-time nursing jobs during that period. The Petitioner has not resolved this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

With the petition, the Petitioner submitted a letter dated June 12, 2008, from [] Hospital in [] India certifying the Beneficiary's employment as "staff" from March 19, 2007, through June 12, 2008.⁵ The initial submission also included an evaluation of the Beneficiary's education and work experience from [] dated December 28, 2015. Although the evaluation referenced the Beneficiary's 8 ½ years of experience with [] Hospital and [] Hospital, the Petitioner did not submit a letter from [] Hospital confirming the Beneficiary's experience there.

In a request for evidence (RFE), the Director stated that the letter from [] Hospital was insufficient to establish the required 60 months of experience. He requested additional letters from the Beneficiary's prior employers. In response, the Petitioner submitted an evaluation of the Beneficiary's education and work experience from [] dated March 9, 2017. Although the evaluation referenced the Beneficiary's more than 11 years of experience in nursing and midwifery, including experience at [] Hospital, [] Hospital, [] Medical Centre, and [] Medical College, the Petitioner did not submit letters from [] Hospital, [] Medical Centre, or [] Medical College confirming the Beneficiary's experience. Further, although the RFE response contained the Beneficiary's paychecks issued by [] Hospital for the periods between December 2016 and March 2017, the paychecks do not indicate her job title or duties, and only one paycheck for the two-week period ending December 24, 2016, covered a period before the priority date of December 21, 2016. A beneficiary must meet all of the requirements of the offered position by the priority date.

In his denial decision, the Director determined that the record does not establish that the Beneficiary possesses an advanced degree or a baccalaureate degree and five years of progressive experience in the specialty.

On appeal, the Petitioner states that it "is providing the supporting documentation which clearly shows 5 years of progressive experience." It submits a copy of the above-referenced letter from [] Hospital. It also submits a letter dated March 5, 2007, from [] Medical Centre in [] India, certifying the Beneficiary's employment as a staff nurse from March 1, 2006, to February 28, 2007.⁶ However, the letter from [] Medical Centre certifies experience that was not listed on the labor certification, which casts doubt on its validity.⁷ The letter from [] Medical Centre also certifies experience that overlaps with her claimed experience at [] Medical College. It is not clear how the Beneficiary worked two nursing jobs from March 1, 2006, to February 28, 2007. The Petitioner has not resolved this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁵ The letter does indicate if she worked full- or part-time.

⁶ The letter does indicate if she worked full- or part-time.

⁷ The omission of the Beneficiary's claimed experience from the labor certification application casts doubt on the experience's validity. See *Matter of Leung*, 16 I&N Dec. 12, 14-15 (Distr. Dir. 1976), *disapproved of on another ground by Matter of Lam*, 16 I&N Dec. 432 (BIA 1978) (finding a foreign national's claim of qualifying experience to lack credibility where he omitted the experience from a labor certification application). Doubt cast on any aspect of the evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The Petitioner also submits several certificates showing the Beneficiary's completion of training courses, but the certificates do not confirm the Beneficiary's prior employment. It also submits the Beneficiary's resume, which states that she has worked at [] Hospital in [] Florida, since October 2008; and that she worked at [] Hospital from March 19, 2007, through June 12, 2008; at [] Medical Centre from March 1, 2006, to February 28, 2007; and at [] Medical College from August 1, 2005, to February 3, 2006. The Beneficiary's resume is not independent, objective evidence of the Beneficiary's prior employment. Further, the dates listed on the resume for her employment with [] Hospital and [] Medical College do not match the dates listed on the labor certification. The record does not contain correspondence from [] Hospital [] or [] Medical College certifying the Beneficiary's claimed experience. Therefore, we will not count the claimed experience with these two employers toward the Beneficiary's required five years of experience.

The record contains inconsistencies regarding the Beneficiary's prior experience, and the record does not contain independent, objective evidence establishing the Beneficiary's 60 months of progressive experience. Thus, the Petitioner has not established that the Beneficiary met the requirements of the labor certification as of the priority date.

C. Prevailing Wage Determination

The Director also determined that the PWD submitted with the petition states different requirements for the offered job than those listed on the labor certification,⁸ and that the requirements listed on the PWD do not meet the requirements for the second-preference advanced degree classification.⁹

The record contains DOL ETA Form 9141, Application for Prevailing Wage Determination, for the position of charge nurse at [] Hospital. The PWD lists the minimum requirements for the position as a bachelor's degree in nursing and six months of experience in professional acute nursing. However, the labor certification requires a master's degree in nursing or a bachelor's degree and five years of experience. Thus, the Petitioner has not submitted a proper PWD for the offered employment. Further, the Petitioner requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification, but the PWD does not require an advanced degree. *See* 8 C.F.R. § 204.5(k)(2).

On appeal, the Petitioner states that the discrepancy between the labor certification and the PWD is not a substantive one. We disagree. The discrepancy is four years and six months of experience,

⁸ To meet Schedule A eligibility, a petitioner must submit a valid PWD obtained in accordance with 20 C.F.R. §§ 656.40 and 656.41. *See* 20 C.F.R. § 656.15(b)(1).

⁹ The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

which is substantive. The DOL issued a Level III wage instead of a Level IV wage for the position, and the experience required for the offered position was a factor in the DOL's determination of the prevailing wage.¹⁰ Further, as detailed above, the discrepancy is also material to eligibility for the classification requested.

The Petitioner also states on appeal that the requirements listed on the PWD meet the requirements for a Schedule A occupation regardless of the experience required. Even if the requirements listed on the PWD meet the requirements for a Schedule A professional nurse, the PWD is not valid for this petition because it does not list the actual minimum requirements for the offered job as stated on the accompanying uncertified labor certification.

D. Eligibility for the Classification Sought

Although not addressed by the Director in his decision, the record does not establish that the Beneficiary is eligible for the classification sought. An advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree. Here, the record does not establish that the Beneficiary possessed at least a U.S. academic or professional degree or a foreign equivalent degree above a baccalaureate, or a U.S. baccalaureate or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of F-H-*, ID# 747162 (AAO May 21, 2019)

¹⁰ DOL guidance regarding the issuance of prevailing wage determinations states:

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level.

Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nov. 2009, https://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited May 7, 2019).